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"The First Thing We Do . . .": The ABA's Resolution on CERCLA Reauthorization

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"The First Thing We Do . . . ": The ABA's Resolution on CERCLA Reauthorization

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Born in the lame duck session of Congress after President Jimmy Carter's defeat in 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") frames the law of hazardous waste cleanup in the United States. Criticized as a "welfare and relief act for lawyers," CERCLA is the center of environmental practice for many attorneys both within and outside government. CERCLA supplements a federal "response authority"[2] and the use of the Hazardous Substance Superfund[3] to clean up sites with powers to compel certain identified potentially responsible parties (PRPs) to undertake cleanup. The government may seek compliance through administrative orders or judicial actions.[4] CERCLA is unlike most other areas of the law, however, because of its unique features.

I. UNIQUE FEATURES OF CERCLA

CERCLA is unusual in the extreme breadth of the "regulated" community. Persons with little, if any, experience with other environmental laws, can become hopelessly enmeshed in a Superfund problem based on activities which they or their predecessors conducted decades ago. Prior ownership of contaminated property for even a short period is enough to trigger liability, for example.[5] The liable past owner need not have contributed to the

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[2] CERCLA § 104, 42 U.S.C. § 9604 (1988).

[3] CERCLA § 111, 42 U.S.C. § 9611 (1988).

[4] CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). Failure to comply with administrative orders subjects one to civil penalties and punitive damages. CERCLA §§ 106(b)(1)-107(c)(3), 42 U.S.C. §§ 9606(b)(1)-9607(c)(3) (1988 & Supp. 1992).

[5] Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844 (4th Cir. 1992).

contamination so long as the material which subsequently moved through the environment was "reposing" there during the period of ownership.[6] Similarly, municipalities may be liable as parties who arranged for disposal of household wastes even if they did not transport the waste to the subject landfills or generate the waste.[7] A party who simply allows another to process its materials, knowing that the process contemplates spillage, is liable to clean up the spills at the other person's plant.[8] This liability may include sellers of scrap metal to recyclers because scrap materials necessarily require processing which creates wastes which must be disposed of.[9]

CERCLA imposes strict liability, without regard to a liable party's knowledge or intent.[10] Although there is no *de minimis* exception to liability,[11] some recent courts have been reluctant to impose entire liability on such parties.[12] Other courts, however, have established a very strict test for showing the "divisibility" which might permit a defendant to avoid joint and several liability.[13] Moreover, there is no duty on the part of the government to mitigate costs or damages, or to be cost-effective.[14] To avoid having to pay costs, the defendant may even have the heavy burden of showing that the agency's actions were arbitrary and capricious.[15]

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[6] *Id.* at 844-46.

[7] B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198-99 (2d Cir. 1992).

[8] Jones-Hamilton Co. v. Beazer Materials & Services, Inc., 959 F.2d 126, 130-31 (9th Cir. 1992).

[9] United States v. Pesses, 794 F. Supp. 151, 157 (W.D. Pa. 1992).

[10] Nurad, Inc. v. William E. Hooper & Sons, 966 F.2d 837, 841 (4th Cir. 1992); United States v. Alcan Aluminum Corp., 964 F.2d 252, 259 (3d Cir. 1992); United States v. A&N Cleaners and Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992); Anspec Co., Inc. v. Johnson Controls, Inc., 788 F. Supp. 951, 956 (E.D. Mich. 1992); Stewman v. Mid-South Wood Products of Mena, Inc., 784 F. Supp. 611, 615 (W.D. Ark. 1992); Mathis v. Velsicol Chemical Corp., 786 F. Supp. 971, 974 (N.D. Ga. 1991).

[11] United States v. Davis, 794 F. Supp. 67, 69 (D.R.I. 1992).

[12] *Id.*; United States v. Shell Oil Co., 34 Env't Rep. Cas. (BNA) 1392 (C.D. Cal. 1992) (finding government's motion to strike defense premature because questions of both fact and law remained unresolved).

[13] *See* Arizona v. Motorola, Inc., 805 F. Supp. 749, 753 (D. Ariz. 1992) (A party must submit clear evidence disclosing the lack of, or lack of potential for, interaction of the substances deposited at any or all locations at the site so that the court can determine that the party's substances "never have, or never will, interact or react with other substances or never have or never will result in environmentally disastrous consequences."); *In re* National Gypsum Co., 139 B.R. 397, 414-15 (Bankr. N.D. Tex. 1992) (rejecting debtor's assertion that joint and several liability would undermine the equitable nature of bankruptcy to the detriment of creditors and debtor).

[14] United States v. Shell Oil Co., 34 Env't Rep. Cas. (BNA) 1342 (C.D. Cal. 1992).

[15] United States v. American Cyanamid Co., 786 F. Supp. 152, 158-63 (D.R.I. 1992); Arizona v. Motorola, Inc., 805 F. Supp. 749, 753 (D. Ariz. 1992).

The defendant may have to pay even where government expenditures are made in violation of the CERCLA provision requiring that there be a cooperative agreement with a state before a project proceeds.[16]

For those CERCLA sites for which the Environmental Protection Agency (EPA) ultimately does commence a civil action, litigants will find that the Act's novelty also manifests itself in deviations from normal judicial procedures. CERCLA claims must be brought in federal court,[17] and there is nationwide service for actions by the United States.[18] Several courts have held that CERCLA preempts Federal Rule of Civil Procedure 17(b) regarding a defendant's capacity to be sued.[19] Though the CERCLA cost recovery plaintiff seeks monetary relief, the courts have been unanimous that there is no right to trial by jury in such an action.[20] A related claim for natural resource damages does trigger such right, however,[21] while the courts are divided as to whether a jury trial is available with respect to contribution claims.[22] Though many courts have sought the assistance of special masters, the United States has resisted their broad use.[23]

In some respects, CERCLA actions can resemble reverse "class actions," because of the multiplicity of defendants. The government usually sues only a few parties and urges the application of joint and several liability. It will often seek further simpli-

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[16] United States v. Gurley Refining Co., 788 F. Supp. 1473 (E.D. Ark. 1992).

[17] CERCLA § 113(b), 42 U.S.C. § 9613(b) (1988 & Supp. 1992).

[18] CERCLA § 113(e), 42 U.S.C. § 9613(e) (1988 & Supp. 1992).

[19] *E.g.*, Waste Management of Wisconsin, Inc. v. Uniroyal, Inc., 35 Env't Rep. Cas. (BNA) 2023 (W.D. Wis. 1992); Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., 35 Env't Rep. Cas. (BNA) 1493 (D. Kan. 1992); Traverse Bay Area Intermediate School Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1301 (W.D. Mich. 1991); United States v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987). *But see* Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448, 1451 (9th Cir. 1987) (following state law).

[20] United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 749 (8th Cir. 1986); Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 997 (E.D. Pa. 1992); Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1390 (E.D. Cal. 1991).

[21] *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1000-03 (D. Mass. 1989).

[22] United States v. Shaner, [23 Litigation] Envt'l. L. Rep. (Envtl. L. Inst.) 20,236 (E.D. Pa. 1992) (jury trial available); United States v. Conservation Chem. Co., 106 F.R.D. 210 (W.D. Mo. 1985) (special master's recommendation) (jury trial unavailable).

[23] *E.g.*, *In re* United States, 816 F.2d 1083, 1091 (6th Cir. 1987) (restricting use of special master). *But see* United States v. Stringfellow, 31 Env't Rep. Cas. (BNA) 1315 (C.D. Cal. 1990) (allowing special master to resolve liability issues); United States v. Hardage, 116 F.R.D. 460 (W.D. Okla. 1987) (approving special master).

fication of its action by attempting to bifurcate or trifurcate actions, seeking to sever third-party claims for contribution and indemnity for separate, later trial while requesting a declaration of liability of the main defendants prior to any judicial assessment of cleanup costs, damages, or other remedy.[24] While seeking the broadest liability from private defendants, the government resists claims against it for contribution or recoupment, invoking doctrines such as sovereign immunity.[25]

The principal preoccupation of lawyers in CERCLA practice is the novel settlement process. Settlement negotiations now typically take place prior to the commencement of any civil action at all. The court sees the government's complaint and the proposed consent decree at virtually the same time in many cases. PRPs negotiate both the remedy to be undertaken with the government and an allocation of cleanup responsibilities and cost sharing among themselves. Though lawyers have typically been involved in these negotiations, neither task particularly requires legal expertise.

The typical CERCLA negotiation involves multiple potentially responsible parties with varying stakes in the outcome. There may be *de minimis* contributors to a site who may be willing to pay a premium to avoid participation in prolonged negotiations. Very minor contributors to the site may view any level of participation as unwarranted. So called non-*de minimis* contributors may have varying degrees of experience with CERCLA and different levels of visibility with EPA. The government will seek to

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[24] *See* United States v. Princeton Gamma-Tech, Inc., 1991 U.S. Dist. LEXIS 91-809 (D.N.J. Dec. 2, 1991) (denying government's motion to sever); United States v. Kramer, 770 F. Supp. 954, 962-64 (D.N.J. 1991) (denying government's motion to trifurcate case); CPC International, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991) (deferring allocation until after remedy phase of a CERCLA trial); Nurad, Inc. v. Hooper & Sons Co., [22 Litigation] Envtl. L. Rep. (Envtl. L. Inst.) 20,079, 20,088 (D. Md. Aug. 15, 1991), *aff'd in part, rev'd in part*, 966 F.2d 837 (4th Cir. 1992) (finding bifurcation of liability appropriate where factual record does not allow determination of NCP consistency when summary judgment motion filed); United States v. Bell Petroleum Services, Inc., 31 Env't Rep. Cas. (BNA) 1341 (W.D. Tex. 1989) (trifurcating proceeding into liability, recoverability, and indemnity phases "for the purposes of organizing the veritable monster before it.").

[25] *See* United States v. Shaner, [23 Litigation] Envtl. L. Rep. 20,236 (E.D. Pa. 1992) (denying government's motion to dismiss recoupment counterclaim); United States v. Montrose Chemical Co., 788 F. Supp. 1485 (C.D. Cal. 1992) (denying government's motion to dismiss indemnity counterclaim); United States v. Amtreco, Inc., 790 F. Supp. 1576, 1578-80 (M.D. Ga. 1992) (finding no subject matter jurisdiction over PRP's counterclaim because not logically related to government's claim against it).

negotiate with one, and only one, entity often called the PRP steering committee. By the nature of things, outside counsel usually must administer the group and often will act as common counsel in negotiations over matters of common concern under an agreement among the PRPs.

Congressional dissatisfaction with the pace and character of settlements in the early 1980s led to inclusion in the 1986 amendments of a special settlement provision designed to improve the process.[26] This section enumerates a series of special settlement mechanisms. Included are authorization of mixed public/private funding of remedial action settlements, encouragement of early settlements with *de minimis* parties, administrative cost recovery settlements, government preparation of nonbinding preliminary allocations of responsibility (NBARs) to divide costs among liable parties, presumptive timetables for settlement negotiations, and public participation in settlement approval. Although EPA has published regional policy guidelines for a number of these settlement tools, few are used. EPA has prepared few NBARs, for example.

Judicial instinct is to approve any settlement to which the parties can agree under a deferential standard designed to ensure that the settlement is "reasonable, fair and consistent with the purposes [of CERCLA]."[27] But CERCLA mandates judicial approval of remedial action settlements in the form of a judicial consent decree.[28] PRPs not party to a settlement and other interested persons, such as citizens or environmentalist groups, may seek to comment upon settlement terms or even to intervene in the civil action commenced to memorialize the agreement. These rights may be of particular importance to non-settling PRPs because a

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[26] CERCLA § 122, 42 U.S.C. § 9622 (1988 & Supp. 1992).

[27] *E.g.*, United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991); United States v. Cannons Engineering Co., 899 F.2d 79, 25 (1st Cir. 1990); United States v. Montrose Chemical Co. of Calif., 793 F. Supp. 237 (C.D. Cal. 1992).

[28] CERCLA § 122, 42 U.S.C. § 9622(d) (1988 & Supp. 1992).

future judgment against them may be reduced only by the settlement amount, leading to their "disproportionate liability."[29]

A final distinguishing feature of the CERCLA administrative cleanup program is that it is a federal projects program rather than a cooperative federal regulatory program. Unlike the various pollution control regimes (*e.g.*, Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act), EPA has not delegated (and sometimes does not share) decision making with its state counterparts. Friction between relevant federal and state agencies has been a result.

In 1986, when the Superfund Amendments and Reauthorization Act[30] was enacted, only the rough outlines of Superfund's character had emerged. Clashes between Superfund and long-established legal principles are now legion. Early on, EPA argued that it would never impose joint and several liability on a *de minimis* party; it has actually done so, or attempted to do so, several times.[31] Early on, EPA agreed to application of the normal rules of civil procedure regarding joinder and impleader in Superfund cases; it has sought departure from those principles for the convenience of its litigators.[32] Early on, EPA argued to postpone the judicial review available under the Administrative Procedure Act to expedite its Superfund activities; it has sought to extinguish any challenge it chooses not to litigate, even after its activities have finished.[33] Early on, EPA argued for limits on the material that could be used in challenging agency activities and orders; it has sought to constrain the courts' power to shape equitable relief in favor of EPA's proposals.[34]

Other clashes, only vaguely understood at CERCLA's inception, have emerged more clearly. EPA seeks to avoid bankruptcy law, so that the debts extinguished by bankruptcy do not include

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[29] *E.g.*, United States v. Alexander, 771 F. Supp. 830 (S.D. Tex. 1991) (imposing sanctions on litigants asserting contribution claims against *de minimis* parties who, by prior settlement with the plaintiff, were entitled to contribution protection); United States v. Pretty Products, Inc., 780 F. Supp. 1488 (S.D. Ohio 1991).

[30] Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter SARA].

[31] United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992).

[32] *See* ALFRED R. LIGHT, CERCLA LAW & PROCEDURE §§ 5.5.2, 5.6.2 (1991).

[33] *See generally* Alfred R. Light & M. David McGee, *Preenforcement, Preimplementation, and Postcompletion Preclusion of Judicial Review under CERCLA*, [22 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10,397, 10,398-400 (1992).

[34] *E.g.*, United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990).

Superfund claims.[35] EPA seeks to avoid the law of corporations, so that purchasers of a company's assets inherit liabilities unrelated to the assets purchased.[36] Insurance law disputes over the applicability of ancient policies to Superfund's retroactive liability have proliferated.[37] The need to understand and address these clashes informs the current discussion of CERCLA reauthorization.

II. THE ABA WORKING GROUP

In 1993, Peter Prestley, then Chair of the Tort and Insurance Practice Section of the American Bar Association (TIPs) established a Task Force on CERCLA Reauthorization. The TIPs section reached out to other sections of the ABA and convinced representatives of the Section of Natural Resources, Energy, and Environmental Law (SONREEL), the Business Law Section, the Section of Science and Technology, as well as other interested organizations (Environmental Law Institute, United States Environmental Protection Agency) to participate in the group's deliberations. Shortly afterwards, however, the group realized that it would not be able to act quickly enough to draft a proposed policy, circulate it among other interested ABA sections, and present it to the ABA's House of Delegates (its legislative body) for adoption because it became clear that the Congressional debate over CERCLA would occur during 1994.

Prestley then approached the ABA's President, R. William Ide III, about setting up an inter-sectional task force to draft a resolution for the ABA House of Delegates to consider at the February 1994 mid-year meeting. President Ide asked chairs of each section of the ABA to designate a single representative to serve on the Working Group. Twelve sections of the ABA responded by appointing representatives. Although the Section on Legal Education and Admissions to the Bar chose not to appoint a representative, I was selected as an At-Large member of the working group.

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[35] *E.g.*, *In re* CMC Heartland Partners, 966 F.2d 1143, 1146-47 (7th Cir. 1992); *In re* Chataugay Corp., 944 F.2d 997, 1008-09 (2d Cir. 1991).

[36] United States v. Mexico Feed & Seed Co., Inc., 980 F.2d 478, 487 (8th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992); Alfred R. Light, *"Product Line" and "Continuity of Enterprise" Theories of Corporate Successor Liability under CERCLA*, 11 MISS. C. L. REV. 63 (1990).

[37] *See* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW (1991).

In a telephone conference call, the group divided itself into several subcommittees to draft portions of the resolution and a supporting report. At a meeting in Washington, D.C., in October, the group adopted key elements of the resolution in principle and established a drafting group to harmonize and synthesize the various provisions into one coherent document. The drafting committee met in November and prepared the final document. At the time this document was finalized, its resolution was co-sponsored by the Standing Committee on Environmental Law, the Section of Natural Resources, Energy, and Environmental Law, and the Tort and Insurance Practice Section.

By the time the resolution was heard on the floor of the House of Delegates in February of 1994, however, the co-sponsorship had changed. The Section of Science and Technology; Section of Real Property, Probate, and Trust Law; the Senior Lawyers Division; and the Kansas City Metropolitan Bar Association added their co-sponsorship. The Section of Natural Resources, Energy, and Environmental Law, which contains many lawyers who benefit from the current Superfund regime, dropped their co-sponsorship and informed the Standing Committee on Environmental Law that it would oppose the resolution. When the time came for consideration on February 7, however, SONREEL did not offer a speaker in opposition to the resolution. It passed on a voice vote. Standing Committee Chair David Baker and the Hon. James M. Strock, Secretary for Environmental Protection for the State of California and an At-Large member of the Working Group spoke in favor of the resolution.

III. CONTENT OF THE RESOLUTION

The ABA's resolution calls for major reform of the Superfund law. The report states that the present statute has resulted in "massive, wasteful, and unproductive litigation."[38] Because lawyers have benefited from the system, they "cannot stand by idly and profit from other people's misery."[39] Instead, there is a call for a reform to promote the overriding goals of fairness, accel-

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[38] Standing Committee on Environmental Law, Section of Tort & Insurance Practice, Section of Natural Resources, Energy and Environmental Law, Section of Business Law, *Reports with Recommendations on CERCLA*. 1994 ABA SEC. PUB. (Copies available upon request to the JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW).

[39] *Id.*

erated suitable cleanup of actual hazards, and overall cost effectiveness and cost benefit justification.

The resolution espouses substantial change in two areas of the Superfund law — allocation of responsibility and cleanup procedures. Limitation of retroactive and strict liability, a requirement for early allocation of responsibility, and provision for payment of unallocated costs through broad-based funding, are changes that should enhance the fairness and efficiency of the system. Through risk-based selection of sites and cleanup standards, elimination of unnecessary intergovernmental requirements, incentives to states to hasten cleanup, and appropriate procedures for assessment and recovery of natural resources damages, the resolution seeks to advance the goal of speedy, effective cleanup.

The most interesting "allocation" reforms concentrate on modification of the liability system. The resolution proposes that "[n]ew liability not be imposed retroactively (i.e., for acts prior to December 1980) on persons who at the time they acted reasonably did not know, or reasonably would not have known, that responsibility for cleanup would arise."[40] Where a person prior to 1980 disposed of waste in order to avoid cleanup responsibility, retroactive liability would be available.

While the resolution does not abolish joint and several liability prospectively, it does direct that liability "be allocated based on each party's contribution to the harm."[41] Joint and several liability would be maintained only under circumstances in which it is available under the Restatement (Second) of Torts. The proposal also encourages early settlement by requiring that cleanup responsibility "be allocated prior to required payment through alternative methods of dispute resolution or other procedures that encourage prompt and effective cleanup."[42]

The "cleanup procedures" section of the resolution calls for "rational and consistent determinations" of cleanup standards based on actual risks posed.[43] It advocates cleanup guidelines which are sensitive to prospective land use. Finally, the intergov-

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[40] *Id.*

[41] *Id.*

[42] Standing Committee on Environmental Law, Section of Tort & Insurance Practice, Section of Natural Resources, Energy and Environmental Law, Section of Business Law, *Reports with Recommendations on CERCLA*. 1994 ABA SEC. PUB. (Copies available upon request to the JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW).

[43] *Id.*

ernmental reform urges that only one governmental entity be responsible for cleanup at any particular site. This principle found its way into the Clinton Administration's Superfund Reform Act of 1994, which was released on February 3, 1994, the week before the ABA considered its resolution.

CONCLUSION

Despite the last-minute opposition of its section containing most "Superfund lawyers," the American Bar Association generally has avoided the incrementalism which has characterized most special interest proposals for reform of this problematic act. Instead, the ABA took the high road, advocating principles of reform which would require substantial amendment of the statute. Even before the ABA formally acted on its resolution in 1994, the ABA's stance began to have an effect on the congressional process through its proposals on issues addressed in the Administration bill.

The ABA's advocacy of a return to the principles of fairness, efficiency, and cost justification is likely to have influence beyond the Administration's proposal. ABA representatives stand ready to assist Congress in evaluating the myriad of specific provisions in light of the overarching principles set forth in the resolution. By bearing in mind these principles a successful reshaping of the complex workings of CERCLA can be achieved.